

# Examining the Exercise of Prosecutorial Discretion in White Collar Crime

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White collar crime is a challenging course to teach, and I am always looking for ways to make the course more fun, interesting, and comprehensible. For the past several years, I have attempted to do this by using a case file and, for the entire semester, student role-playing, with the goal of helping students learn how to build, or defend against, a complex criminal case. And I ask the students, throughout the semester, to consider very carefully the hard issues surrounding the exercise of prosecutorial discretion.

## I. THE CASE FILE APPROACH

For a number of years, I taught a three-unit lecture course in white collar crime in which the students engaged in brief skills exercises. Because of the skills component, the class is capped at forty-five. With that many students, each student is able to make one five-to-ten-minute presentation. This lecture course has always been fun to teach. I have never been quite satisfied, however, with the hybrid lecture/skills nature of the class.

The opportunity to try a new approach arose a few years back, when my school instituted a series of two-unit "capstone" courses designed to pull together different substantive areas for third-year students. When our academic dean asked me to teach a criminal-law capstone, I said, "Well, umm, sure; sounds like a lot of work but if you *really* want me to . . . ." So, recently I have been teaching a two-unit criminal law capstone course that focuses on litigating a white collar case. This class meets both our professional skills and writing requirements and we continue to offer the three-unit white collar crime survey course.

The truth is that I have always wanted to teach white collar crime using a case file. This way, the students could study the subject by developing a case through the investigation, charging, pre-trial, trial, and appellate stages. Be careful what you wish for, though. The case file method is enormously rewarding, but always very time consuming, both to develop and administer.

It works like this: the course is capped at twenty-four students. I divide the class into prosecution and defense teams of three students each. At the beginning of the semester, I give each side some basic facts in the form of witness interviews and documents. Then, each side begins to develop a theory of the case, which proceeds through the grand jury and then to trial and appeal. Each week we have graded skills exercises, which may include client counseling, witness interviews,

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motions to suppress, pre-trial motions, direct- and cross-examinations, arguments on jury instructions, closing arguments, post-trial motions, sentencing arguments, and appellate arguments. Students who are not participating that week may act as judges, jurors, or supervising attorneys, and provide both oral and written feedback to that week's advocates. The students also write two sets of ten-page papers, generally based on motions or arguments relating to the issues in the case file.

Because I am particularly interested in issues surrounding the exercise of prosecutorial discretion where the statutory boundaries are unclear (RICO, anyone?), we spend about seventy percent of our time on substantive crimes and the rest on practical and procedural issues. We often return to the issues of vagueness and overbreadth, over-federalization, and over-criminalization. The capstone designation also requires that I spend some substantial time outside the area of substantive criminal law. But that is fairly easy to do in this context, and we regularly discuss evidence, criminal procedure, constitutional law, and ethics.

Apart from the logistical challenges of running the weekly exercises, the greatest challenge is in assigning weekly readings that correspond to each week's exercises. There is no perfect way to do this. I follow two general guidelines. First, I try not to overload the students with complex materials; for example, I never do both RICO and money laundering in a single semester. Second, I try to mix up tactical and procedural issues with substantive issues; this makes for nice changes of pace. Other than that, the course is an ongoing experiment.

The best approach, I believe, is to ask the teams to focus on a particular crime or set of crimes and to assign substantive materials relating to those crimes at the beginning of the course. (For reasons I will explain below, I like using insider trading. Political corruption crimes also work well as the basic crimes, for many of the same reasons.) Then, the teams can begin developing a theory of the case while we cover materials relating to, for example, grand juries and parallel proceedings. And, invariably, cover-up crimes come into the picture along the way and, perhaps, RICO, tax fraud, or money laundering.

The defense teams have a more complex task in some respects. I assign each team member specific clients and ask the team members to assume that they are operating under a joint defense agreement. As the investigation progresses, each team member must consider whether to make a cooperation overture to the government (and members of the prosecution teams must decide which witnesses they want to try and flip). This has proven to be one of the most interesting aspects of the course, as defense teams begin to unravel and prosecutors hone in on their prey. Just like real life.

## II. PROSECUTORIAL DISCRETION

From the beginning, I try to articulate our course goals clearly: applying complex criminal statutes; developing practical skills; and considering basic criminal justice issues. In the context of white collar crime, the latter means assessing how far to stretch criminal statutes that often lack clear boundaries. So, I

ask the students to answer the following questions at each step: (1) What crimes apply? (2) What theories of each crime apply? If you charge the crime, are you operating within clearly-established boundaries, or are you advocating an expansive or creative use of the law? (3) Whom do you charge? The corporate entity? Low-level participants? (4) Should the government bring parallel administrative, civil, and/or criminal proceedings? Focusing on the exercise of prosecutorial discretion allows me both to speak to our many students who end up as prosecutors and judges and to consider issues that I personally find fascinating. On a broader level, group decision-making is a skill that can benefit everyone.<sup>1</sup>

When picking topics, I try to focus on recent cases that raise these questions. There are always new cases, but it is hard to top insider trading for the array of issues concerning prosecutorial discretion that these cases present. Insider trading is the gift that keeps on giving, including, most recently, the cases against SAC Capital Investors,<sup>2</sup> Raj Rajaratnam<sup>3</sup> and Nelson Obus.<sup>4</sup>

The Martha Stewart case is a classic example (and I am still waiting for a better case to come along). Because of the issues of prosecutorial discretion that the Stewart case raises, I often track many of the issues in that case when developing my case file. There is also substantial scholarly commentary that applies to this subject and this case. For example, Professor Moohr has written about the many issues of prosecutorial discretion in the Stewart case,<sup>5</sup> and Professor Buell has written about the difficult definitional issues in securities fraud in general.<sup>6</sup>

A brief summary of the case will help explain why it is so rich from a pedagogical perspective. Just to recount briefly, Stewart was originally investigated as a tippee; her broker breached his duty to his firm by giving her trading information relating to ImClone stock. She then sold her stake in ImClone. The SEC charged her under this theory in a civil suit, which was later settled.<sup>7</sup> In a decision that remains mysterious to this day, the United States Department of Justice did not seek an insider trading charge against her; instead, the government alleged that she defrauded her shareholders when she declared herself innocent of

<sup>1</sup> See Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 J. LEGAL EDUC. 36 (2013).

<sup>2</sup> The recent indictment of this hedge fund has already generated substantial commentary. See, e.g., Paul H. Robinson, *Making a Crime Criminal*, L.A. TIMES, July 31, 2013, at A13.

<sup>3</sup> *United States v. Rajaratnam*, 719 F.3d 139 (2d Cir. 2013).

<sup>4</sup> *SEC v. Obus*, 693 F.3d 276, 279 (2d Cir. 2012) (The district court originally dismissed the SEC's complaint against Obus, but the Second Circuit reinstated the case in an opinion that purports—quite unsuccessfully in my view—to provide a restatement of the law of tipper/tippee liability.). See Susanne Craig, *The Curious Case of Nelson Obus*, N.Y. TIMES, June 5, 2011, at B1.

<sup>5</sup> Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law*, 43 HOUS. L. REV. 591, 597 (2006).

<sup>6</sup> Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511 (2011).

<sup>7</sup> Press Release, Sec. & Exch. Comm'n, *Martha Stewart and Peter Bacanovic Settle SEC's Insider Trading Charges* (Aug. 7, 2006), <http://www.sec.gov/news/press/2006/2006-134.htm>.

insider trading. At Stewart's trial for securities fraud and cover-up crimes, the trial judge dismissed the fraud charge on a Rule 29 motion, so the theory was never contested on appeal.<sup>8</sup> Why the alternate theory? As I have argued elsewhere, the likely answer is sentencing exposure and litigation strategy.<sup>9</sup>

The case is so rich for study: Whom to charge (the insiders? the brokerage firm? the tipping broker? the broker's assistant? the tippee?)? What charges and theories to bring? Whether to proceed criminally, civilly, or both? These are the kinds of questions that my students and I continually find engaging, and that the case file approach enriches at every turn.

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<sup>8</sup> United States v. Stewart, 305 F. Supp. 2d 368, 376 (S.D.N.Y. 2004). Stewart was, of course, convicted and sentenced for attempting to cover up her insider trading. See United States v. Stewart, 433 F.3d 273 (2d Cir. 2006).

<sup>9</sup> J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45 (2007). The total loss that ImClone shareholders suffered because of Stewart's trading was \$45,673. In the criminal case, Stewart's alleged misrepresentations had a market impact on her company's stock of approximately \$365 million. See *id.* at 78.